No. 95-1960 (2)

FILED
AUG 2 1996
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

SPANG & COMPANY, *et al.*,
Petitioners,

v.

JEAN E. BRYTUS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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Dated: August 2, 1996

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30 pp

QUESTIONS PRESENTED

Should the Court grant the petition for certiorari where Petitioner Spang failed to raise in the courts below the question it would now have the Court decide, where the Third Circuit affirmed the trial court decision without opinion, and where the trial court decision does not create a conflict among the circuits?

Where the negotiated pension plan document bars any reversion of plan assets to Spang "under any circumstances" and allocates any surplus assets to increase the benefits of the plan participants, did the trial court correctly conclude that Spang's purported amendment of the plan which allowed it to take the surplus assets for itself was void "as being at odds with the non-reversion provision of the Plan"?

Was the trial court decision correct on the alternative grounds that a Shutdown Agreement (which Spang negotiated with a union in 1981) contained an "additional promise" to pay participants the surplus assets upon plan termination?

Was the trial court decision correct on the alternative grounds that, because the Plan contained no amendment procedure, "Spang . . . violated the terms of the Plan by unilaterally amending [it] in 1981 and 1988" to give itself the right to surplus assets?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the Petition For A Writ Of Certiorari filed in this case.

STATUTORY PROVISIONS INVOLVED

Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, provides in pertinent part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 402(b) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1102(b), provides in pertinent part:

> Every employee benefit plan shall— . . . (3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan.

Section 502(a)(1)(b) and (a)(3) of ERISA, 29 U.S.C. § 1132(a)(1)(b) and (a)(3), provides in pertinent part:

> A civil action may be brought—(1) by a participant or beneficiary— . . . (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan; . . .
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . .

STATEMENT OF THE CASE

A. Introduction

Petitioner Spang's Statement Of The Case is inaccurate and incomplete in material respects.

Jean Brytus, a widow of a Spang retiree and lead plaintiff for the class of hundreds plan participants in this action, receives a benefit of $25 per month from the pension plan Spang terminated in 1988.[1] At the time

[1] The two Defendants in *Brytus, Kotyk* and *Galonka* are Spang & Company ("Spang") and the Pension Plan Spang administered for its Fort Pitt Bridge and Electric Weld Divisions in Canonsburg, Pa. The Plaintiffs in *Brytus, Kotyk* and *Galonka* are former employees and surviving spouses entitled to benefits from that Pension Plan, and we refer to them as "Participants."

of termination, the plan had almost $7,000,000 in surplus assets. The question litigated below was who had the right to this surplus under the operative language of the governing plan document.

Incredibly, Spang's Petition fails to address the critical contract language which determined the outcome of this case. That language is part of the collectively bargained pension plan document referred to in these proceedings as the "1978 Pension Agreement." In unambiguous terms, it declares that contributions to the Pension Fund "may not *under any circumstances* revert to the Company. *If this Pension Plan shall terminate, the funds in the Pension Fund shall be used in the manner provided in Article IX.*" Article IX, in turn, expressly allotted any surplus remaining after plan termination to increase of pension benefits. (Quoted in the trial court's opinion contained as the appendix to the Petition (hereinafter "6/30/94 Decision"), p. 7a(emphasis added)). Thus, if the plan terminated with surplus assets. the monthly benefits of Ms. Brytus and the other participants would increase.

Participants argued below that the phrase "under no circumstances" meant exactly what it said. Thus, Spang was not free to simply shut down the plant, wait until the Pension Agreement expired, and then unilaterally amend or "restate" the plan to take away the Participants' important right to the surplus pension assets and seize those assets for itself. In other words, Participants argued that the right to the pension surplus was contractually vested, and that Spang could not assert any alleged amendment power to abrogate that vested right after contract expiration.

Agreeing with Participants, the trial court held that the pension rights in question survived contract expiration. and the Third Circuit affirmed without opinion. The trial court "relied upon alternate bases . . ." for finding in favor of Participants. Petition, 2/10/95 Decision, p. 39a.

The first basis for the decision—which is the only one discussed in Spang's Petition—"was that Spang had violated the terms of the Plan by unilaterally amending the Plan in 1981 and 1988 to provide for reversion when there was no specific procedure in the Plan providing for such amendments." *Id.* (applying the reasoning of *Curtiss-Wright Corp. v. Schoonejongen,* 115 S. Ct. 1223, 1230-31 (1995), which held that where the plan lacks an amendment procedure, the plan may "be forever unamendable under standard trust law principles").

The second basis for the trial court's holding was that "even if Spang had properly amended the Plan to provide for reversion . . ., [*the*] *amendment . . . would fail as being at odds with the non-reversion provision of the Plan.*" *Id.*, p. 40a (emphasis added). Thus, this second ground for the decision was that the anti-reversion provision forbidding reversion "under any circumstances" created rights which survived contract expiration and precluded any amendment which purported to take away the rights—even if other amendments would have been lawful.

A final basis for the decision was that Spang had entered into a Shutdown Agreement in October, 1981, which contained an "additional promise" to pay Participants the surplus assets upon plan termination. *Id.*, p. 12a.

Spang fails to disclose the second and third grounds on which Participants prevailed. Moreover, Spang totally ignores the Pension Agreement's specific language relating to surplus pension assets, as well as the specific language of the Shutdown Agreement which confirmed Participants' right to those assets. Focussing only upon the first basis for the trial court's decision, Spang attempts to recharacterize the trial court's decision as a novel far-reaching opinion which will have serious adverse consequences for thousands of employers. Spang says that the decision will impact "the broad range of employee benefit plans embodied in collective bargaining agreements,"

rendering these many thousands of plans "unamendable," so that the "amendments adopted by unions and employers in triennial collective bargaining have been invalid ever since ERISA was enacted in 1974, thus casting the terms of the plans into doubt and permitting participants to sue for any benefits that have been reduced or eliminated by those amendments.' Petition, pp. 24-25.

A more honest analysis of this case demonstrates that Spang's characterization is wrong, that this case is *sui generis,* and that the trial court's decision does not create a conflict among the circuits. Carefully-crafted, unambiguous language not commonly found in pension plans mandated that Spang would never be able to amend the plan to allow it to seize the surplus assets. The trial court's decision—affirmed without opinion—simply requires Spang to honor its agreement. Clearly, the trial court's decision will not have the far-reaching consequences described in Spang's near-hysterical predictions.

B. Factual Background

Spang acquired the Cannonsburg, Pa., plant in 1963. In the same year, Spang and the Union representing the plant's employees entered into a Pension Agreement. Several successor Pension Agreements followed, the last of which was the 1978 document which governs the terms of the pension plan.

The operative language of the 1978 Pension Agreement (as well as the predecessor agreements) denies Spang "any right, title, or interest in or to any of the funds in the Pension Fund, except as specifically provided in this Agreement." A. 202.[2] No other provision of the Pension Agreement vests Spang with a right to any of the funds—through "reversion" or otherwise. Indeed, the Plan's only reference to reversion is a clause that forbids it. As noted, this clause (dating back to 1963) states that the "con-

[2] "A. ——" refers to the Joint Appendix in the Third Circuit.

tributions made by the Company to the Pension Fund may not *under any circumstances* revert to the Company." It then states that "If this Pension Plan shall terminate, the funds in the Pension Fund shall be used in the manner provided in Article IX." Petition, p. 7a. Article IX declares the surplus assets must be used to increase Participants' monthly benefts.[3]

The plan participants had a particular reason to seek control over the pension funds through their union's bargaining in 1963. Starting in that year, all funds contributed to the plan were for each hour of their labor, so that these were funds participants might otherwise have enjoyed in weekly paychecks. Significantly, at the time of these 1963 negotiations, the plan was under-funded by more than $1,300,000. A. 694, ¶ 15. As this substantial shortfall affected the Company's marketability, Spang asked the union to release it from its funding obligation. In striking their bargain, the parties agreed to fund the plan by cents-per-hour contributions, and Spang in turn agreed to the critical language promising that "under no circumstances" would it take the contributions, and that instead all surplus assets would be allocated pursuant to the termination article. A. 694; A. 1812, ¶ 2; A. 1814, ¶ 6. Under this arrangement, the employees first committed 15 cents for each of the hours

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[3] Article IX divides participants into two groups at termination. The first, "group a", comprises those already receiving or vested in pensions. A. 203, § 9.1(a). Article IX first allotted funds to paying group (a)'s pension benefits and only then allotted funds to group (b), which included all other participants—i.e., those who, lacking enough service to vest, only had accrued rights. A. 203, § 9.1(b). The allocation scheme also provided what to do if "changes in mortality and investment experience" left excess assets. These were to be used to increase benefits. If that increase produced benefits "above the level of benefits in effect at the date of termination for group (a) [then increases] shall be granted equally and uniformally to all Participants in both groups (a) and (b)." A. 204.

they worked for funding the plan. By 1965, the diversion from employee wages doubled to 30-cents-per-hour. A. 1856, § 7.2. Contributions under the cents-per-hour regime constituted nearly 60% of all post-1963 contributions. A. 536-37.

Spang announced the closing of the Canonsburg plant in September, 1981, and it subsequently laid off all the employees. At the time of the closing, Spang undertook negotiations with the Union over a variety of issues. During those negotiations, Spang disclaimed any liability for certain benefits which the Union strongly felt it owed to the active employees. (E.g., short-term continuation of health benefits, short-term continuation of pension credit). Spang also provoked opposition from the Union when it took the position that it had the right to take any surplus from the pension fund should the pension plan terminate at some future date. Spang showed the Union representative a supposed "restated plan" which Spang had unilaterally drafted and which it "intended" to adopt in the future. That "plan"—which Spang's Board of Directors would "adopt" later in the year without disclosure to either the Participants or the Union—contained a provision granting Spang the right to the surplus assets upon plan termination.

In the meantime, however, and before Spang's "adoption" of the restated plan it had unilaterally drafted, the Union and the participants filed a class action in federal court which raised the surplus assets issue, along with other issues that grew out of the closing. A. 407 (hereinafter "1981 Class Action"). Count II of the complaint in the 1981 Class Action claimed the Pension Agreement allotted surplus assets to the participants. A. 416-18.

The Union and Spang resolved the 1981 Class Action by entering into a Shutdown Agreement. This Shutdown Agreement required Spang to continue all benefits of the

Pension Agreement. In particular, the Shutdown Agreement provided:

> All eligible participants will receive the pension benefits to which they are entitled as described in the terminated Pension Agreements . . .

6/30/94 Decision, Petition, p. 7a. Of course, under "the terminated Pension Agreements," any future plan termination was to result in benefit increases for all Participants if there were surplus assets. Based on this fact, the trial court below found that the Shutdown Agreement amounted to "an *additional promise* to apply the terms of the terminated Pension Agreements, including the language concerning surplus funds." 6/30/94 Decision, Petition, p. 12a (emphasis added).[4]

At the court hearing in October, 1981, on joint motion for dismissal of the 1981 Class Action held pursuant to F.R.C.P. 23(e), the district court specified the showing it would require permitting dismissal of the suit—that "absent class members would not be in any way prejudiced" by a dismissal predicated on the closing agreement. A. 1780. Plaintiffs' counsel spoke first, noting that settlement embodied in the Shutdown Agreement impli-

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[4] The Union agreed to a standard release in the Shutdown Agreement. The release tracks the language of individual releases which active employees signed after the shutdown. It states simply that the *"benefits set forth in this Agreement* shall be in complete discharge of any and all claims . . ., and receipt and acceptance of *such benefits* by an employee shall constitute a complete release. . . ." 6/30/94 Decision, Petition, p. 8a (emphasis added).

While Spang argued in the Courts below that the release relinquished the rights to surplus assets, one of the "benefits set forth in this Agreement"—which served as the *quid pro quo* for the release—was the continuation of all benefits of the "terminated Pension Agreement." The trial court held that one of the benefits of the "terminated Pension Agreement" was the increase in benefits which would result from the surplus assets. 6/30/94 Decision, Petition, pp. 11a-12a).

cated the complaint's four counts in different ways.[5] He said the settlement was a final compromise of the claims in the first and fourth counts, counts seeking fringe benefits and arbitration of disputes. Then he addressed Count II, participants' claim to the surplus. The court transcript shows counsel stating that, with respect to rights *"to any overage in the pension fund,"* the closing agreement *left "the parties where they were prior to the shutdown."* The Company would determine in the future when it was "going to terminate the pension plan, and *then the issue of overage in the pension fund will be one which can be litigated at that point,* if any participant feels that what the company is doing violates the shutdown agreement or the pension agreement as it is incorporated into the shutdown agreement." A. 1781-82 (emphasis added).

Spang's counsel joined the assessment that the Shutdown Agreement did not affect the ERISA count claiming surplus. He, too, differentiated its effects on counts one and four, on the one hand, and two and three, on the other. He said that counts one and four (which did not involve the surplus) were "taken care of by the

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[5] Two of the Complaint's four counts concerned the surplus issue —most directly, the second count, which contested Spang's claim to the pension surplus. That Count recited that "All participants in the Pension Plan will be deprived of an increase in their vested or accrued benefits if the Company takes for itself any additional monies in the Pension Fund . . ." A. 418, ¶ 39. Other counts sought insurance coverages, vacation pay and the like to which some members of the class claimed entitlement. A. 412-16; 420-22.

Spang now claims that "Pursuant to the Shutdown Agreement, the Employer paid over $641,000 in immediate, additional benefits that the employees were not otherwise entitled to, such as severance pay." Petition, p. 5. Participants dispute this point, contending that the amounts paid were for the other preexisting obligations—insurance coverages, vacation pay, etc.—which Spang initially refused to pay when it closed the plant. However, this factual dispute is not material, as the trial court's decision is still correct even if we assume that Spang's version of the facts is true.

shutdown agreement" and release paragraph. By contrast, he said: "Insofar as counts two and three [involving the surplus] are concerned, relating to ERISA, the company has taken the position, which I believe is correct that we cannot ask anyone to waive statutory rights in futuro, and accordingly the agreement to dismiss *without prejudice* was made upon the basis of our understanding of various counts and how they have been disposed of by the settlement agreement." A. 1784 (emphasis added).

Given counsel's harmonious representations, the court found that "the rights of the members of the class would not be adversely affected by the dismissal without prejudice" and approved the dismissal Spang sought in its shutdown agreement. A. 1786.

Despite the unequivocal provisions of the Pension Agreement and Shutdown Agreement, Spang took the surplus for itself and refused to use the surplus to increase benefits when it terminated the plan in 1988. Thus, Jean Brytus and others brought this action to enforce their contract rights and rights under the Plan. The complaint invokes both ERISA, the federal statute governing the rights of participants "to enforce the terms of [a pension] plan" (29 U.S.C. § 1132(a)(3) and (a)(1)(b)), and Section 301 of the LMRA, 29 U.S.C. § 185, the federal statute governing actions for breach of labor contracts.

Spang's principal argument in the Courts below was that the 1981 Shutdown Agreement had "waived" Participants' right to the surplus assets. As noted, the 6/30/94 Decision concluded that—far from releasing this right—the Shutdown Agreement actually contained "an additional promise" by Spang to use the surplus to increase Participants' benefits upon plan termination.[6]

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[6] Alternatively, the 6/30/94 Decision found that the doctrine of judicial estoppel barred Spang from making this "waiver" argu-

Spang also argued that the 1978 Pension Agreement was not in fact the "plan document" which governed the pension plan. Spang argued that two documents from 1950 and 1960 had constituted the governing "plan documents" over the years, and that it was free under these plan documents to "amend" the plan again in 1981 and 1988—granting itself a right to take the surplus. Spang lost on this issue in the courts below, and has now abandoned this argument concerning the documents from 1950 and 1960. Thus, for purposes of this Petition, the 1978 Pension Agreement is the sole governing plan document, and it has no procedure allowing amendment of the plan.

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ment. In a separate action which also involved Petitioner Spang, the Third Circuit explained that the doctrine of judicial estoppel "precludes a party from assuming a position in a legal proceeding that contradicts or is inconsistent with a previously asserted position." *Delgrosso v. Spang*, 903 F.2d 234, 241 (3rd Cir. 1990), *cert. denied*, 111 S.Ct. 428, 112 L.Ed.2d 412 (1990). The trial court below found Spang was again estopped, holding:

> Plaintiffs assert that these representations in open court estop Spang from relying upon the Shutdown Agreement as a waiver of plaintiffs' rights under the Pension Agreement. I agree. Spang's attorney made representations to the court in furtherance of Spang's interest in garnering court approval of the settlement of a lawsuit, and in direct response to the court's concern that the Plan's participants not be prejudiced by settlement. Spang now argues that its attorney did not necessarily mean that the Shutdown Agreement did not address the issue of surplus funds, or that a waiver of rights with respect to such funds was not accomplished by the agreement. It distresses me that such an argument has been presented to this court. In presenting such an argument, Spang has needlessly consumed the time and efforts of this court and of opposing counsel, even though the position taken hardly survived its utterance. I suggest that Spang's present counsel reread the transcript of the 1981 hearing and should, perhaps, consider the duty of candor owed to opposing counsel and the court before making such arguments in the future.

6/30/94 Decision, Petition, pp. 12a-13a, note 5.

The trial court emphasized, however, that it was relying "upon alternative bases for requiring Spang to disgorge the reversion." Petition, 2/10/95 Decision, p. 39a. The first "was that Spang had violated the terms of the Plan by unilaterally amending the Plan in 1981 and 1988 to provide for reversion when there was no specific procedure in the Plan [i.e., the 1978 Pension Agreement] providing for such amendments." *Id.* The second was that "even if Spang had properly amended the Plan to provide for reversion . . ., [*the*] *amendment . . . would fail as being at odds with the non-reversion provision of the Plan.*" *Id.*, p. 40a (emphasis added). A final basis for granting judgment to Participants was that the Shutdown Agreement contained an "additional promise" to pay them the pension surplus when and if the plan terminated. Petition, p. 12a.

REASONS FOR DENYING THE PETITION

I. INTRODUCTION AND SUMMARY.

Spang first observes that, under Court precedent interpreting the National Labor Relations Act ("NLRA"), an employer has an absolute right to reduce or terminate "nonvested" benefits at will after a labor agreement has expired and after bargaining to impasse with the union. Petition, p. 12, citing *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 206-08 (1991). Spang then identifies the alleged problem created by the decision below as follows: if an ERISA plan is embodied in a labor contract which has no procedure for amendment (rendering it unamendable according to the reasoning of the *Curtiss-Wright* and the Court below), then the employer is effectively deprived of this federal labor law right to unilaterally change or terminate benefits. Spang's solution to this problem is to have this Court *imply* a procedure for amending the plan in these situations. Spang says that this Court should find such an implied right in the NLRA precedent which

allows employers to terminate nonvested benefits (such as *Litton*):

> [T]he NLRA creates the context of law within which collective bargaining agreements are created, amended and terminated. Conflict between ERISA and the NLRA can be avoided entirely if the "procedure for amending such plan" is understood, in the case of a plan embodied in a collective bargaining agreement, as the regulatory framework of the NLRA.

Petition, p. 21.

There are several reasons why the Court should refuse to decide the question Spang asks it to decide and deny Spang's Petition.

First, in the courts below, Spang never made this argument concerning the alleged problem of the "unamendable plan." Spang's failure to raise the issue in the court below is, by itself, grounds for denying the Petition.

Second, the decisions below consist of magistrate opinions which the District Court and Third Circuit affirmed without opinion, so that the decisions have limited precedential effect. Furthermore, the opinions create no conflict in the Circuits, and simply purport to be following established law.

Third, even if this Court desired to address the question posed by Spang (i.e., whether there should be an implied right to terminate nonvested plan benefits after contract expiration where the collectively bargained plan has no amendment procedure), this case is not a good vehicle for deciding the question. The Court can reach this question only if the right to the surplus assets was in fact a "nonvested" one which was terminable upon the Pension Agreement's expiration. Thus, before reaching the question Spang proposes, the Court would have to consider (1) whether the trial court erred in finding Participants'

right to the surplus pension assets contractually vested under the 1978 Pension Agreement; and (2) whether the trial court erred in finding that the Shutdown Agreement contained an "additional promise" by Spang to pay over the surplus assets to Participants in the same manner as described in "the terminated Pension Agreements."

Fourth, even if the Court were to find that Participants' rights were "nonvested" and that Spang made no promise which endured beyond expiration of the 1978 Pension Agreement, it should still refuse to hear this case since the alleged problem of an "unamendable plan" is neither serious nor widespread. When negotiating plans with unions, employers can and do protect themselves by specifying whether the negotiated benefits are of the type which can be modified or terminated at contract expiration. The employer here chose simply *not* to specify that the rights created by the Pension Agreement were terminable or amendable. The Court should decline Spang's request that it intervene to rescue it from the consequences of its own failure to reserve a power to amend or terminate.

II. HAVING FAILED TO MAKE ITS ARGUMENT BELOW, SPANG CANNOT NOW ADDRESS IT TO THIS COURT.

The Supreme Court does not consider questions which a petitioner failed to raise in the lower courts. *Delta Airlines v. August*, 450 U.S. 346, 362 (1981) ("question presented in petition but not raised in court of appeals is not properly before us"); *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980).

Participants' counsel have searched Spang's briefs in the courts below, and have not found any argument raising the question Spang would now have this Court decide. Spang simply never raised this argument concerning the alleged problem of the "unamendable plan." Rather, Spang

was content to argue (1) that the "plan" here had actually consisted of other documents which gave it the right to amend and take surplus assets; (2) that the Shutdown Agreement had "released" rights to the surplus; and (3) that Participants' claims were barred by the running of the statute of limitations and the alleged failure to exhaust a claims procedure. Spang should not be permitted to advance a new argument for the first time to this Court.

III. BEFORE THE COURT COULD ADDRESS THE QUESTION WHICH SPANG POSES, IT WOULD HAVE TO DETERMINE WHETHER THE MAGISTRATE OPINIONS ERRED IN FINDING THAT PARTICIPANTS' CONTRACT RIGHTS TO THE PENSION ASSETS WERE MEANT TO LAST BEYOND EXPIRATION OF THE PENSION AGREEMENT.

This case is not a good vehicle to decide the issue Spang proposes. First, we do not have the benefit of any reasoning by the Court of Appeals (or, indeed, by the District Court), since the magistrate opinions were affirmed without opinion. Second, granting review would likely result in consideration of several other issues which involve evidentiary or factual questions, which do not involve legal issues of national significance, and as to which there is no conflict among the circuits. In particular, should the Court grant the petition, it would inevitably have to delve into issues such as the "vesting" of contract rights to pension surplus which turn on the unique facts of each individual case. *E.g., Bryant v. International Fruit Products Co.*, 793 F.2d 118, 123 (6th Cir. 1986) ("Each case of this kind is controlled by the language of the documents creating the particular plan involved.").

A. The Trial Court Correctly Found That The Pension Agreement Created Vested Rights To Surplus Pension Assets.

This is not just an ERISA case. In addition to suing to enforce plan terms under ERISA, Participants brought a separate claim under LMRA § 301, 29 U.S.C. § 185. That statute grants federal courts jurisdiction to hear "suits for violation of contracts between an employer and a labor organization." It also authorizes courts to develop a federal common law of labor contracts. *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957). Spang admits in its Petition that, under this developing federal common law, certain benefits provided by labor contract can become contractually "vested," so that the employer cannot terminate such benefits even when the agreement expires. Indeed, Spang quotes the observation in *Litton* that "contractual obligations will cease . . . upon termination of the bargaining agreement," but that there are exceptions, and these "[e]xceptions are determined by contract interpretation. *Rights which accrued or vested under the agreement will, as a general rule, survive the termination of the agreement.*" Petition, p. 12 (emphasis added; quoting *Litton,* 501 U.S. at 208.

Litton is but one of a number of this Court's decisions which recognize that negotiated benefits may vest contractually. *E.g., Chemical Workers v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 181 footnote 20 (1971) (observing with respect to retiree health benefits that such *"vested retirement rights may not be altered without the pensioner's consent"*); *Nolde Bros., Inc. v. Local No. 358 Bakery & Confectionery Workers Union,* 430 U.S. 243, 248-49 (1977) (depending on contract's language, severance pay could be an "accrued" or "vested" right earned during the life of the contract but payable even after contract expiration); *John Wiley & Sons v. Livingston,* 376 U.S. 543, 555 (1964) (same).

There are no "magic words" which are necessary to create "vested" rights which survive contract expiration. See *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993) (rejecting "the extreme position . . . that the contract must either use the word 'vest' or must state unequivocally that it is creating rights that will not expire when the contract expires"). Usual rules of contract construction apply, and if a benefit is in essence "deferred compensation" earned during the agreement but payable at a later date, courts will be more inclined to find the benefit "vested."

UAW v. Yard-Man, Inc., 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984), is but one of many cases which apply these principles. The labor agreement in *Yard-Man* contained the simple promise that the Company "will provide insurance" for retirees. *Id.* at 1480. On summary judgment, the Sixth Circuit found the insurance benefits vested. 716 F.2d at 1479-80 (citing *John Wiley, Nolde Bros.*, and *Pittsburgh Plate Glass Co.*). *Yard-Man* utilized common law rules of contract construction,[7] but it also observed that retiree benefits "are typically understood as a form of delayed compensation or reward for past services." It therefore applied an "inference" that such benefits are vested. See also *United Steelworkers v. Textron, Inc.*, 836 F.2d 6, 9 (1st Cir. 1987) (Breyer, J., recognizing that simple contractual promise to provide retiree welfare benefits could

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[7] Three specific examples of such rules *Yard-Man* cites are: (1) a court should interpret each contract provision as part of the integrated whole "so that all of the provisions, if possible, will be given effect." *Id.* at 1479-80; (2) the "agreement's terms must be construed so as to render none nugatory and avoid illusory promises. [citation]" *Id.* at 1480; (see also *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1296 (6th Cir. 1991)), (3) a non-specific general clause (such as a general duration clause of a labor contract) cannot "take precedence" over a more specific clause (such as one promising benefits during retirement). *Id.* at 1483.

be seen as a commitment to pay the benefits "even after the particular collective bargaining agreement expires").[8]

Courts have used such reasoning in finding rights to surplus pension assets contractually vested. Thus, in *Delgrosso v. Spang & Co.*, 769 F.2d 928, 935, 938 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986), the same employer now filing this Petition attempted to seize surplus assets under a different collectively bargained Pension Agreement covering different plants. The Third Circuit interpreted an anti-reversion clause identical to that here as being without "the slightest ambiguity" in prohibiting Spang from taking for itself "those monies which it was contractually required to pay into the Fund as *deferred compensation* for its employees." Similarly, in *Bryant v. International Fruit Producers Co.*, 793 F.2d 118, 123 (6th Cir. 1986), the plan allowed reversion of assets "in no event and under no circumstances." The Sixth Circuit concluded: "this language in itself precludes an amendment that would allow money once contributed to be reclaimed." See also *Unitis v. JFC Acquisition*, 643 F. Supp. 454, 459-60 (N.D. Ill. 1986) (where plan stated that "no part of the Trust Fund shall ever revert or be repaid to the Company," the Company could not later amend plan to give it a right to reversion).[9]

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[8] See also *Keffer v. H. K. Porter Co.*, 872 F.2d 60 at 64 (4th Cir. 1989) (recognizing the "far-reaching understanding of the context in which retiree benefits arise: [they] are typically understood as a form of delayed compensation or reward for past services [which would not] be left to the contingencies of future negotiations"); *Weimer v. Kurz-Kasch*, 773 F.2d 669 (6th Cir. 1985); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017 (1986); *United Steelworkers v. Newman-Crosby Steel*, 822 F. Supp. 862, 866 (D.R.I. 1993) ("Retiree benefits are generally considered to be 'status' benefits that are expected to continue as long as the employee is retired.").

[9] In light of these authorities, Spang is plainly wrong in suggesting that any interest in pension surplus is *per se* "nonvested." Petition, p. 16, note 10. Such right may be contingent, in that

The operative language here states that "contributions made by the Company to the Pension Fund may not *under any circumstances* revert to the Company" and that "if this plan shall terminate" the surplus is to be used to increase benefits. This obligation to pay over the surplus upon plan termination is *not* limited to the term of the parties' three-year agreement. Indeed, if it were interpreted as so limited, the benefit would be wholly illusory, since all Spang would have to do to deprive Participants of the important benefit would be to wait until contract expiration and eliminate it.

Given the language of the Pension Agreement and applying the foregoing authorities (e.g., *Yard-Man*, which holds that an "agreement's terms must be construed so as to render none nugatory and avoid illusory promises," 716 F.2d at 1480), Participants' right to surplus assets was "vested." The benefit was meant to survive contract expiration and amendments purporting to eliminate it are void. Thus, the trial court correctly held that "even if Spang had properly amended the Plan to provide for reversion . . ., [the] amendment . . . would fail as being at odds with the non-reversion provision of the Plan." *Id.*, p. 40a. This language in the decision below, while not containing the word "vested," shows that the trial

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it is not payable unless and until the plan terminates and it is ascertained that a surplus does exist. However, if these contingencies are met (and assuming the contract language is interpreted as creating a right which survives contract expiration), then the right to the benefit is absolute and nonforfeitable. That a vested benefit can be subject to contingencies is by no means a novel proposition. Even a deferred vested pension, statutorily vested and "nonforfeitable" once the employee satisfies five years of service, is subject to the contingency that the employee actually live past normal retirement age. S. Bruce, *Pension Claims: Rights and Obligations* 241-42 (BNA Books, 2d ed. (1993) (citing relevant statutory provisions). *Cf.*, *Weimer v. Kurz-Kasch*, 773 F.2d 669, 676 (6th Cir. 1985) (finding retiree health benefit "vested" even though it was contingent on participant "remain[ing] retired and unemployed").

court concluded that the non-reversion clause had created a right which had become contractually "vested." [10]

Spang also suggests that Participants conceded below that the pension rights in question here were not contractually "vested." (See Petition, pp. 15-16 and notes 10 & 11: "Respondents admitted on brief that their claim to the surplus is not even a claim for a 'benefit,' much less an accrued or vested pension benefit protected by ERISA . . ."). Far from conceding this question, Participants argued repeatedly that the right to pension surplus was vested by contract. Thus, Participants stated pp. 3-4 of their October 20, 1989 Reply Brief: "Participants' rights to these pension monies were *not* terminable at Spang's whim upon the Pension Agreements' expiration date . . .,' citing "traditional judicial doctrines of 'vested rights' and 'deferred compensation,' which apply with particular force when retirement benefits are at stake . . ." [quoting *Bryant*, *Delgrosso*, and *Yard-Man*]. Participants later stated in the same brief that precedent had held that "the rights to pension assets were akin to 'deferred compensation.' . . . In addition, case law holds that such rights obviously survive contract expiration." *Id.*, pp. 12-14.

Spang cites three cases in support of its argument that the benefits in question here are not "vested." *Anderson v. Alpha Portland Industries*, 836 F.2d 1512 (8th Cir. 1988), *cert. denied*, 489 U.S. 1015 (1989); *Adcox v. Teledyne, Inc.*, 21 F.3d 1281 (6th Cir.), *cert. denied*, 115 S.Ct. 193 (1994); *Heussner v. National Gypsum Co.*, 887 F.2d 672 (6th Cir. 1989). None of those cases, however, dealt with contract language—such as that here and that discussed in *Nolde Bros.*, *Delgrosso*, and *Yard-Man*—which created rights surviving contract expiration. The

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[10] Thus, Spang errs in contending that the trial court did not find the right to surplus assets to be "accrued or vested." Petition, p. 16.

cases Spang cites are therefore distinguishable, and the decision below does not create a conflict among the circuits.

B. The Shutdown Agreement Contains An Additional Promise To Pay Participants The Surplus Assets Upon Plan Termination.

Participants' contract rights enforceable under LMRA § 301 are not limited to those stemming from the 1978 Pension Agreement. Rather, Participants can—and have—sued under that statute to enforce rights emanating from the October, 1981 Shutdown Agreement. See *Retail Clerks International v. Lion Dry Goods, Inc.*, 369 U.S. 17, 24-27 (1962) (the word "contracts" in statute refers not simply to typical three-year collective bargaining agreements, but rather includes all contracts, such as strike settlement agreements).

As the trial court found, the Shutdown Agreement's reaffirmation that Participants would receive all the benefits of the terminated Pension Agreement amounts to an "additional promise" to pay participants the surplus assets upon plan termination. This promise cannot be reasonably construed as being subject to an "implied right" to amend the plan to allow Spang to take the surplus.

Obviously, if this Court were to agree with the trial court's interpretation of the Shutdown Agreement, then it would not reach the question proposed in Spang's Petition (i.e., whether there should be an implied right to terminate nonvested plan benefits after contract expiration where the collectively bargained plan has no amendment procedure). This is because there has never been a "contract expiration" with respect to promise made in the Shutdown Agreement.

Apparently aware of this problem, Spang suggests that the Shutdown Agreement had nothing to do with Participants' victory below: "[Participants'] motion for sum-

mary judgment was based solely on the 1978 Pension Agreement. No claim was made with regard to the Shutdown Agreement." Petition, p. 7 note 5.

This is yet another false assertion by Spang. In their brief as to the summary judgment motion, Participants stated:

> But regardless of whether or not the Pension Agreements themselves contemplate continuation of these important rights after contract expiration, the 1981 Shutdown Agreement makes clear that these rights do indeed survive. That Shutdown Agreement (Exh. 4 to Motion For Summary Judgment) provides: "All eligible participants will receive the pension benefits to which they are entitled as described in the terminated Pension Agreements." Exh. 4, p. 3. Of course, under "the terminated Pension Agreements," any future plan termination must result in benefit increases for all Participants if there are surplus assets.

October 20, 1989 Reply Brief, pp. 3-4. See also Participants' December 17, 1991 supplemental letter brief, A. 1543-44.

Spang's own allegations in a legal malpractice complaint it recently filed against its attorneys who handled the 1981 Class Action also belie its assertion that the Shutdown Agreement did not serve as an alternative basis for Participants' victory below. In that malpractice action, Spang states that Participants in *Brytus* contended "that the shutdown agreement by its own terms, provided that any surplus pension assets which might exist on plan termination was [sic] required to be distributed as benefits to the Plan participants." Complaint in *Spang & Company v. Reed, Smith, Shaw & McClay,* No. GD96-8964, p. 12 ¶ 54. In the very next paragraph of the malpractice complaint, Spang states that the trial court accepted this contention as one of the alternative bases "in ruling

on the motion for summary judgment filed by the plaintiffs in [*Brytus*].". *Id.*, ¶ 55.

IV. EMPLOYERS CAN EASILY PROTECT THEMSELVES FROM THE PROSPECT OF HAVING AN "UNAMENDABLE PLAN."

Even if this were a case which squarely presented the alleged problem of the "unamendable plan" (which Spang says results from the decision below), the Court should still deny the Petition. This alleged problem simply does not warrant expending this Court's scarce resources. This is because, when negotiating benefit plans with unions, employers can and do protect themselves by specifying whether the benefits are of the type which can be modified or terminated at contract expiration.

Thus, in *Stewart v. KHD Deutz of America, Corp.*, 980 F.2d 698 (11th 1993), the language contained in the signed labor agreement stated: "Upon the expiration or termination of this Agreement, the Company shall have the right to continue the Plans covered herein or to amend, modify, suspend or discontinue the Plans." *Id.* at 701.[11] Similarly, in *Ryan v. Chromalloy*, 877 F.2d 598, 600-01 (7th Cir. 1989), the documents governing the plan covering union employees had for many years included language specifying that "the Plan Administrator reserves the right to amend, modify or terminate this Plan at any time." In light of this language, the court concluded that the employer had lawfully terminated retiree welfare benefits after it sold the plant where the retirees had worked.

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[11] While this language indisputably gave the employer the right to discontinue active employee benefits upon contract expiration, the Eleventh Circuit found an ambiguity with respect to retiree benefits, since other parts of contract suggested retiree benefits were "for life," and since the clause could be seen as applying only to future retirees. *Id.* at 703.

In contrast to the employers in the *Stewart* and *Ryan* cases, the employer here failed to gain language specifying that the rights created by the Pension Agreement were terminable or amendable. The Court should decline Spang's request that it intervene to rescue it from the consequences of its own failure to reserve a right to amend. As Judge Posner stated in an *en banc* decision concerning retiree health beenfits:

> Employers adamant against assuming perpetual obligations can eliminate all doubt by insisting on a clause that makes any entitlement to health benefits granted by the agreement expire on the date the agreement expires.
>
> . . . [Employers] certainly don't have to grant such benefits *in perpetuo*. If they did so in the past, not anticipating the recent rise in health costs, they should not expect the courts to bail them out by undoing the contractually determined allocation of risk on the question. Courts do not sit to relieve contract parties of their improvident commitments, except within the limited dispensation conferred by the doctrine of impossibility, not here invoked.

Bidlack, supra, 993 F.2d at 609.

CONCLUSION

The Court should deny Spang's Petition for Certiorari.

Respectfully submitted,

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